Supreme Court U.S.
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No. 02-249

In The
Supreme Court of the United States

PEABODY COAL CO.,

Petitioner,

v.

WILMA J. GROVES and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION OF RESPONDENT WILMA J. GROVES

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QUESTIONS PRESENTED FOR REVIEW

(A) Whether there is a split in the decisions of the circuit courts of appeal regarding the consideration of and weight given to the opinion of a miner's treating physician in federal black lung cases.

(B) Whether the court below violated the Adminstrative Procedure Act, the Longshore Act and this Court's ruling in *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994), in affirming an award of black lung benefits.

(C) Whether this Court should review the Department of Labor's treating physician rule, 20 C.F.R. § 718.104(d), as that rule was not relied on by the ALJ in adjudicating Mrs. Groves's claim for black lung benefits.

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STATUTES AND REGULATIONS

The following statutes and regulations are involved in this case:

Black Lung Benefits Act, 30 U.S.C. §§ 901-945.

20 C.F.R. § 718.104(d) (2002).

> . . . (d) Treating physician. In weighing the medical evidence of record relevant to whether the miner suffers, or suffered, from pneumoconiosis, whether the pneumoconiosis arose out of coal mine employment, and whether the miner is, or was, totally disabled by pneumoconiosis or died due to pneumoconiosis, the adjudication officer must give consideration to the relationship between the miner and any treating physician whose report is admitted into the record. Specifically, the adjudication officer shall take into consideration the following factors in weighing the opinion of the miner's treating physician:
>
> (1) Nature of relationship. The opinion of a physician who has treated the miner for respiratory or pulmonary conditions is entitled to more weight than a physician who has treated the miner for non-respiratory conditions;
>
> (2) Duration of relationship. The length of the treatment relationship demonstrates whether the physician has observed the miner long enough to obtain a superior understanding of his or her condition;
>
> (3) Frequency of treatment. The frequency of physician-patient visits demonstrates whether the physician has observed the miner often enough to obtain a superior understanding of his or her condition; and

(4) Extent of treatment. The types of testing and examinations conducted during the treatment relationship demonstrate whether the physician has obtained superior and relevant information concerning the miner's condition.

(5) In the absence of contrary probative evidence, the adjudication officer shall accept the statement of a physician with regard to the factors listed in paragraphs (d)(1) through (4) of this section. In appropriate cases, the relationship between the miner and his treating physician may constitute substantial evidence in support of the adjudication officer's decision to give that physician's opinion controlling weight, provided that the weight given to the opinion of a miner's treating physician shall also be based on the credibility of the physician's opinion in light of its reasoning and documentation, other relevant evidence and the record as a whole.

RESPONDENT WILMA J. GROVES'S BRIEF IN OPPOSITION

Respondent Wilma J. Groves hereby respectfully urges this Court to deny the Petition for a Writ of Certiorari seeking review of the Opinion and Judgment of the United States Court of Appeals for the Sixth Circuit issued on January 17, 2002, affirming the Decision and Order on Remand of the Administrative Law Judge issued on November 24, 1998. The prior decisions are reproduced in the Appendix to the Petition at pages 1 and 26, respectively. The Petitioner has failed to state an issue worthy of review by this Court and the Court should deny the Petitioner's request.

Peabody Coal Company alleges the Court of Appeals erred in using a treating physician presumption to affirm the award of black lung benefits, and it argues that there is a split in the decisions of the circuit courts of appeals regarding weighing treating physicians' opinions. Peabody also argues that this treating physician rule violates the Administrative Procedure Act, the Longshore Act, and this Court's ruling in *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994), regarding the use of presumptions in black lung cases.

Mrs. Groves disputes Peabody's characterization of the treating physician rule in the Sixth Circuit as a presumption. Under Sixth Circuit precedent, ALJs in black lung cases are not required to credit treating doctors' opinions, either standing alone or where there is a conflict in the record. Furthermore, no split in the law regarding the weighing of treating physicians' opinions exists among the courts of appeals such as to merit this Court's granting review of Peabody's petition.

The court below stated that Peabody's attempt to argue that there was a treating doctor presumption lacked merit, and the court disagreed with Peabody's characterization of its precedent as ambiguous or in conflict with established case law. The court found substantial evidence to support the award of benefits. The decision below did not apply a *per se* rule requiring an administrative law judge to accord a treating doctor enhanced credibility in adjudicating claims under the Black Lung Benefits Act, 30 U.S.C. § 901-945 ("Act"). In the Sixth Circuit, as the court clearly stated, no presumption exists that automatically credits a treating physician's opinion as correct. Rather, the Sixth Circuit, like other circuits handling black lung claims, relies on history of treatment, nature of that

treatment, and the rationale behind the doctor's diagnosis before crediting that physician's opinion. In this case, as the lower court held, the treating physician relationship was a factor properly considered by the administrative law judge ("ALJ") when he evaluated the credibility of the medical opinion evidence and granted benefits to Mrs. Groves.

STATEMENT OF THE CASE

Elze Groves was sixty years old when he died on April 30, 1995. He had worked as an underground coal miner for thirty-three years. From 1963 to 1988, Mr. Groves worked for Peabody Coal Company. For twenty of those years he worked as a continuous miner operator, cutting coal with a continuous mining machine at the face of the mine. This machine used large metal bits rotating at high speed to cut the coal and it was an extremely dusty job. Mr. Groves was exposed to and breathed large quantities of fine coal mine dust – coal and rock – as he worked. Mr. Groves stopped working in 1987 because of severe shortness of breath. On his death certificate, the physician listed his immediate cause of death as cardiac arrest due to acute myocardial infarction and atherosclerotic heart disease.

On May 11, 1995, Wilma Groves, Elze's widow, filed a claim for survivor's benefits under the Federal Coal Mine Health Act of 1969, 30 U.S.C. §§ 901-945 (the Black Lung Act). Evidence from Mr. Groves's treating doctors, Dr. Robert Johnson and Dr. W. B. Blue, who had treated Mr. Groves for more than twenty-five years, was submitted to the Department of Labor. This evidence included treatment notes and hospital records. The Department of Labor

denied the claim, and Mrs. Groves requested a hearing before an administrative law judge.

The ALJ assigned to the claim initially denied Mrs. Groves's application. In his decision issued June 30, 1997, the ALJ concluded that Mr. Groves had pneumoconiosis, but the ALJ held the disease did not cause, contribute to, or hasten Mr. Groves's death. The ALJ based his finding of pneumoconiosis on the opinions of Mr. Groves's treating doctors, Dr. Robert Johnson and Dr. W. B. Blue. Dr. Johnson, the ALJ said, had treated Mr. Groves for approximately fifteen years, and had diagnosed pulmonary pneumoconiosis, which he described in a report in 1988 as advanced and crippling black lung. The ALJ said that Dr. Blue had noted in his treatment notes in 1991 through 1994 the presence of chronic obstructive lung disease. In a report prepared after Mr. Groves died, Dr. Blue stated Mr. Groves's lung disease was the result of many years in the coal mines. The ALJ credited the opinions of Drs. Johnson and Blue, noting they were supported by the reports of several other doctors who had examined Mr. Groves, as well as several of Mr. Groves's hospital records. In addressing whether Mr. Groves's death was due to pneumoconiosis, the ALJ said Dr. Blue's opinion that death was hastened by pneumoconiosis was not well-documented. Mrs. Groves appealed that determination to the Benefits Review Board ("Board").

The Board reversed and remanded the case to the ALJ. The Board held that the judge erred in concluding that Dr. Blue's report was not documented because the judge did not discuss whether Dr. Blue's treatment notes provided adequate documentation to support his opinion. The Board said the ALJ did not specifically address the treatment notes in making his credibility determination.

Upon review, the ALJ found Drs. Johnson and Blue most credible, noting that they had treated Mr. Groves for twenty-five years. The ALJ found that Mr. Groves had problems with his breathing during this time, and was diagnosed with, among other things, chronic obstructive pulmonary disease, bronchitis, acute bronchitis, and coal workers' pneumoconiosis. The judge said these treatment notes, which show that Mr. Groves's lung function was impaired, supported Dr. Blue's conclusion that Mr. Groves's lung disease secondary to pneumoconiosis and lack of oxygenation contributed to hasten Mr. Groves's death. The ALJ concluded that he found Dr. Blue's opinion and treatment notes to be the most credible evidence in the record regarding the cause of Mr. Groves's death.

Peabody appealed the ALJ's granting of benefits to the Board, which approved the ALJ's rationale and upheld the award of benefits to Mrs. Groves. The company next sought review of the Board's decision in the Sixth Circuit Court of Appeals. The appellate court reviewed the Board's decision to determine, first, if it was supported by substantial evidence in the record, and second, if it was a correct application of the law to the case. The court approved the determination on both fronts and affirmed the Board's determination to award benefits.

The court stated that a survivor is eligible for black lung benefits if she proves that the miner had pneumoconiosis, which arose out of coal mine employment, and that the miner's death was due to pneumoconiosis. A claimant can prove that death was due to pneumoconiosis if pneumoconiosis was a substantially contributing cause of the miner's death.

The court then reviewed its holdings with respect to the weight to be given to the opinion of a treating physician. The court stated:

> In *Tussey v. Island Creek Coal, Co.*, 982 F.2d 1036, 1042 (6th Cir. 1993), we confirmed that the "opinions of treating physicians are entitled to greater weight than those of non-treating physicians." However, we did not suggest that treating physicians should automatically be presumed to be correct – we indicated that their opinions should be "properly credited and weighed." Indeed, Peabody concedes as much: "In post-1994 unpublished decisions, however, this Court almost uniformly has recognized that notwithstanding *Tussey,* ALJs are not required to credit treating doctors' opinions either standing alone or where there is conflicting proof in the record." . . . *Tussey* requires ALJs in black lung cases to examine the medical opinions of treating physicians on their merits and to make a reasoned judgment about their credibility.

Peabody Coal Co. v. Groves, 277 F.3d 829, 834 (6th Cir. 2002).

The court stated that the treating physician's opinion should be given its proper deference, and in determining what deference was appropriate, the court turned for guidance to 20 C.F.R. § 718.104(d)(5), which delineates the criteria for the development of medical evidence in black lung proceedings. This regulation states that in appropriate cases, the relationship between a miner and his treating physician may constitute substantial evidence in support of the adjudication officer's decision to give controlling weight to the treating physician's opinion, provided that the weight given to the opinion shall be based on the credibility of the opinion in light of its reasoning

and documentation and other relevant evidence and the record as a whole. *Id.*

The Sixth Circuit noted with approval that the ALJ considered all of the medical evidence and made appropriate credibility determinations. The court stated the reasons the ALJ gave for crediting Dr. Blue's opinion as well as the reasons for crediting and discrediting the other medical opinion evidence. The court said that it was appropriate for the ALJ to decide if a report was sufficiently reasoned and documented, and that it would reverse the ALJ only if his decision were not supported by substantial evidence. The court accepted the ALJ's determination of Dr. Blue's credibility and found Dr. Blue's treatment notes indicating a knowledge of Mr. Groves's pulmonary problems provided adequate support for the conclusion that Mr. Groves's death was hastened by his pneumoconiosis. *Id.* at 835.

REASONS FOR DENYING THE WRIT OF CERTIORARI

ARGUMENT

A. No Conflict Exists Between Treating Physician Analyses of the Courts of Appeals.

The courts of appeals that have addressed the treating physician evaluation in black lung benefits cases apply a similar analysis. Each circuit requires the fact-finder to determine the credibility of the medical evidence. Each has a treating physician rule that allows the fact-finder to grant greater deference and weight to a treating physician's opinion, but such enhanced stature comes only after the fact-finder has considered the treating physician's

relationship with the patient and the basis for the physician's opinion. The fact-finder must make a reasoned determination that the treating physician's opinion should receive greater weight. In no circuit does the treating physician's opinion receive greater weight automatically, presumptively, or mechanically.

Five circuits – the Third, Fourth, Sixth, Seventh, and Eleventh – handle the majority of the nation's black lung cases. In each of those circuits, the prevailing rule directs an ALJ to review the credentials of a treating physician and then to determine if the physician's relationship and familiarity with the patient's condition favor giving that doctor's opinions greater weight. The Sixth Circuit considers multiple factors when it reviews an appeal dealing with the weight given to a treating physician's opinion. In no way does the Sixth Circuit apply a presumption for automatically crediting the opinion of a treating physician nor does it mechanically adopt the treating physician's opinion in a case. In the *Groves* decision, the Sixth Circuit stated that it did not apply an automatic presumption. The Sixth Circuit affirmed that ruling in *Wolf Creek Collieries v. Director, OWCP*, 298 F.3d 511 (6th Cir. 2002), where the court again addressed the arguments made in *Groves* that the court applied an automatic preference favoring treating physicians' opinions. The court reviewed the *Tussey* and *Groves* decisions and other case law and stated: "In sum, the misconceived 'treating physician presumption' does not exist, and we have never mandated that automatically controlling weight be accorded such opinion." 298 F.3d at 521.

In 1993, the Sixth Court noted that "opinions of treating doctors are entitled to greater weight than those of non-treating physicians." *Tussey v. Island Creek Coal*

Co., 982 F.2d at 1042. However, the court noted that before granting such stature to a treating physician's opinion, the ALJ must "properly credit and weigh" the doctor's reports, opinions, and treatment history with other reports in the record. *Id.*

Peabody argues that the Sixth Circuit rule adopted first in *Tussey* conflicts with the rulings of the Fourth and Seventh Circuits and asserts that in the Fourth and Seventh Circuits a physician's status as a treating doctor is an irrelevant factor in determining credibility and weight to be given to a medical opinion. Peabody also argues that there is no medical reason to give the treating doctor's opinion any additional weight.

Many courts have recognized that the treating physician may gain additional insight into a miner's respiratory or pulmonary condition because of a history of treatment over a period of time. In *Thorn v. Itmann Coal Co.*, 3 F.3d 713, 717 (4th Cir. 1993), the court stated: "The opinion of a treating physician is entitled to great weight, though it is not dispositive." (citations omitted). In *Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1097 (4th Cir. 1993), the Fourth Circuit again observed "that as a general matter the opinions of treating and examining physicians deserve especial consideration," but it did not endorse a blanket requirement or a presumption that they be given greater weight. It restated this position in *Grigg v. Director, OWCP,* 28 F.3d 416, 420 (4th Cir. 1994), when it noted that a treating physician's opinion was entitled to great, though not necessarily dispositive, weight.

Deference to the treating physician is not a mechanical rule that requires the court to accept the opinion of a treating source. As all the courts have made clear, the ALJ

must evaluate the credibility of the treating physician's opinion and must make sure that it is reasoned and documented before accepting it over contrary opinions. In *Amax Coal Co. v. Franklin*, 957 F.2d 355 (7th Cir. 1992), the court explained that crediting a treating physician with more insight into a miner's condition makes more sense because of the nature of pneumoconiosis and coal-mine-dust-related disorders:

> Black lung disease, at least when broadly defined, is a progressive disease, so the opinion of a physician, who like Tomak, had treated the miner over a period of many years might on that ground deserve some weight in comparison with the report of a specialist who had seen the miner only once. The treating physician might learn something from being able to study the course of the developing disease.

Franklin, 957 F.2d at 359. This rationale – that a doctor who has treated a miner for many years can observe the progression of any pulmonary impairments – offers a logical basis for crediting that physician's opinions.

The Eleventh Circuit too has recognized that a treating physician's opinion may be entitled to significant weight, stating in *McClendon v. Drummond Coal Co.*, 861 F.2d 1512, 1514 (11th Cir. 1988): "The ALJ was entitled to accord greater significance to Dr. Brasfield's opinion, as the miner's examining physician, than to that of Dr. Hamilton, who only reviewed McClendon's records after his death. 'An unequivocal diagnosis by an examining physician familiar with the claimant's medical history is entitled to great weight.'" (Citing *Hamrick v. Schweiker*, 679 F.2d 1078, 1082 (4th Cir. 1982)). The Tenth Circuit has endorsed a similar rule: "The well-established rule in this

circuit is that the Secretary must give substantial weight to the testimony of a claimant's treating physician unless good cause is shown to the contrary." *Micheli v. Director, OWCP*, 846 F.2d 632, 636 (10th Cir. 1988) (citations omitted).

The Third Circuit has also required the treating physician's opinion to be given special status, if it is sufficiently reasoned: "[T]he opinion of a miner's treating physician plays a major role in the determination of eligibility for black lung benefits." *Mancia v. Director, OWCP*, 130 F.3d 579, 590-591 (3d Cir. 1997). However, in *Lango v. Director, OWCP*, 104 F.3d 573, 578 (3d Cir. 1997), the court observed that the opinion of the treating physician merits special consideration, but the physician must supply more than a conclusory statement. *See also Balsavage v. Director, OWCP*, 295 F.3d 390, 396 (3d Cir. 2002).

No conflict of law exists among the circuits regarding the weighing of a treating physician's opinion in black lung cases. The appellate courts agree that a physician's status as the miner's treating physician can provide a legitimate basis for preferring that opinion if the opinion is credible. The treatment relationship enables the physician to gain an insight over time into the nature of the miner's health problems that a review of records or a one-time exam does not allow.

20 C.F.R. § 718.104(d) was published as a final rule by the U.S. Department of Labor on December 20, 2000, as part of a set of changes to the black lung program first proposed in January 1997. 65 Fed. Reg. 79,920-80,107 (Dec. 20, 2000). The National Mining Association and others filed a lawsuit broadly challenging many of the regulatory changes and a Preliminary Injunction Order

was issued by the district court on February 9, 2001, which stayed the application of these regulations. This injunction was lifted in August 2001, when the district court upheld the regulations against all challenges. *National Mining Ass'n v. Chao*, 160 F. Supp. 2d 47 (D.D.C. 2001). The National Mining Association appealed, and on June 14, 2002, the Court of Appeals for the District of Columbia issued its decision. The court held that the treating physician rule in § 718.104(d) codified judicial precedent and did not work a substantive change in the law. The court stated that: "NMA argues that the rule contravenes a number of court decisions. This argument is unfounded. The consensus among courts has been that an agency adjudicator may give weight to the treating physician's opinion when doing so makes sense in light of the evidence and the record, but may not mechanistically credit the treating physician solely because of his relationship with the claimant." *National Mining Ass'n v. Department of Labor*, 292 F.3d 849, 861 (D.C. Cir. 2002) ("*NMA*"). The District of Columbia Court of Appeals then reviewed several decisions from the Fourth, Sixth, and Seventh Circuits and stated: "In short, appellants do not cite a single case from *any* circuit in which a Court of Appeals espoused principles at odds with the new rule embodied in § 718.104(d). As the cases demonstrate, the courts to consider the issue have adopted the balanced policy reflected in the new rule." *Id.* at 862. (italics in original).[1] Subsequently, the Sixth Circuit has affirmed the *NMA*

[1] Peabody is represented on this Petition by the same attorneys who represented the National Mining Association in the case challenging the revised regulations. Peabody stated in its petition that no petition for a writ of certiorari will be filed in *NMA v. Department of Labor, supra*. Page 3, n.1.

analysis of the law regarding weighing treating physicians' opinions. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703 (6th Cir. 2002).

The treating physician rule employed by the ALJ and affirmed by the Sixth Circuit in this case did no more than follow this common sense approach. Dr. Johnson and Dr. Blue treated Mr. Groves over a period of twenty-five years. They had noted his chronic obstructive pulmonary disease and breathing difficulties and they had an intimate familiarity with his respiratory condition. The ALJ considered this familiarity to be important in weighing the opinion evidence as to whether Mr. Groves's chronic lung disease was due to his coal mine work, and whether this contributed to hasten his death. The treating relationship was an appropriate factor for the ALJ to consider in evaluating and weighing the medical opinion evidence.

Peabody's Petition does not accurately depict the positions of the courts of appeals. Peabody maintains there is a conflict among the circuits when there is no conflict. What Peabody is really challenging is the decision of the Sixth Circuit finding the award of benefits was supported by substantial evidence. All of the circuits have a treating physician rule which allows for greater weight to be given to the opinion of the treating doctor provided that treating relationship gives the doctor greater insight. Peabody's issue is whether Dr. Blue's treatment of Mr. Groves gave him greater insight. The ALJ said it did, and the Board and the court of appeals found no error in the ALJ's determination.

B. The Treating Physician Rule Does Not Violate the APA.

Peabody also argues that the Sixth Circuit's treating physician rule violates sections 7(c) and 12 of the Administrative Procedures Act (APA), 5 U.S.C. §§ 556(d) and 559, section 21(b) and (c) of the Longshore Act, 33 U.S.C. § 921(b) and (c), and this Court's ruling in *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994). In its consideration of the National Mining Association's challenges to the Department of Labor's changes to the black lung regulations, the D.C. Circuit specifically rejected a similar argument challenging the Department of Labor's treating physician regulation, 20 C.F.R. § 718.104(d)(5). The D.C. Circuit's discussion fully applies to the challenge Peabody has raised in this petition:

> According to NMA, the revised rule impermissibly shifts the burden of proof from claimant to employer. In support of this argument, NMA relies on [*Director, OWCP v.*] *Greenwich Collieries*, [512 U.S. 267 (1994),] where the Supreme Court held that absent specific statutory authorization, agencies may not informally create rules that supplant the APA's requirement that "the proponent of a rule or order has the burden of proof." 512 U.S. at 269-71 (quoting 5 U.S.C. § 556(d)). *Greenwich Collieries*, however, is inapplicable here, for neither the revised regulation's plain language nor the Secretary's interpretation, *see* Br. for Appellees at 38, relieves claimants of the burden of proving both pneumoconiosis and the credibility of the doctor's opinion. Indeed, the Secretary points out that this regulation does not even "address which party bears the burden of proving the proposition to which the medical opinion evidence relates." Br. for Appellees at 38

(citing 65 Fed. Reg. at 79,933-34). Equally without merit is NMA's related argument that the treating physician rule is invalid because it "treats proof differently" by unfairly advantaging claimants' evidence; NMA even suggests that the rule enables doctors to help claimants obtain benefits fraudulently by "exaggerating" the extent of claimants' illnesses. Br. for Appellants at 34. This argument assumes that ALJs will automatically give controlling weight to treating physicians' opinions, yet the regulation actually places limits on their capacity to do so. *See* 20 C.F.R. § 718.104(d)(5) (permitting reliance on treating physician testimony only where physician's opinion is credible and consistent with record evidence). The requirement that a treating physician's opinion be credible, moreover, largely eliminates any risk of fraud.

Arguing that the treating physician rule is also arbitrary and capricious, NMA claims that "there is no scientific or medical reason to conclude that a treating physician has clearer insight into any medical question that might arise in a black lung claim than a pulmonary specialist or any other doctor." Br. for Appellants at 35. In support of this argument, NMA cites record evidence suggesting that "there is a significant likelihood that a treating physician will use deception to assist patients in obtaining third party paid benefits." Cmts. of the Nat'l Mining Ass'n at 44 (1/6/2000), *reprinted at* J.A. 2231. Yet the agency considered and rejected this allegation, convincingly pointing out that the claim could "as easily be directed toward any party-affiliated physician, or group of such physicians, who may benefit by tailoring conclusions to fit the interests of the party paying for the medical opinion." 65 Fed. Reg. at

> 80,024; *see also Motor Vehicle Mfrs. Ass'n v. State Farm* [*Mut. Auto. Ins. Co.*], 463 U.S. [29] at 51-54 (holding that an agency's duty of reasoned decisionmaking includes the requirement to explain away contrary evidence) and, *e.g.*, *id. at 52* ("Rescission of the [safety restraint] requirement would not be arbitrary and capricious merely because there was no evidence in direct support of the agency's conclusion.").

National Mining Assoc. v. Chao, 292 F.3d 849, 870-871 (D.C. Cir. 2002). Peabody errs in trying to relitigate this issue through this unrelated case.

C. The Court Should Not Review the Regulation in 20 C.F.R. § 718.104(d).

This Court should deny Peabody's Petition challenging 20 C.F.R. § 718.104(d). As stated above, the Secretary of Labor published this regulation as a final rule on December 19, 2000. It played no role in the ALJ's award of benefits. As Peabody remarks in its Petition to this Court, the regulation was adopted as parties to the *Groves* case were drafting briefs on the merits of the appeal to the Sixth Circuit.

In its handling of this case, the Sixth Circuit panel did note that the new regulation existed. However, as it mentioned the treating physician regulation only in passing, the appellate court specifically stated that it did not apply in this case. *See Groves*, 277 F.3d at 834. However, the lower court noted, the language of the regulation was instructive on the issue of how to analyze a treating physician's opinion. *Id.* It was not imperative to the decision nor did it play any role in reaching the reviewing

court's conclusion to affirm the award of black lung benefits.

Peabody cannot in this case raise its objections to the D.C. Circuit's decision in *NMA v. Chao*, *supra.*, which upheld the Department of Labor's treating-physician regulation. As counsel for Peabody noted in its Petition to this Court, The National Mining Association would file no appeal to this Court in its case against the Department of Labor. The time for filing any such appeal has now lapsed, and Peabody may not attack collaterally the *NMA* decision through this litigation.

Supreme Court precedent on this issue is clear: A party cannot raise an issue that it did not raise before a lower court. *See Rogers v. Lodge*, 458 U.S. 613, 628 (1982); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n. 2 (1970). Peabody did not discuss the merits of the regulation regarding the treating physician's rule in its appeal to the Sixth Circuit. By failing to raise that objection there, Peabody cannot raise that objection for the first time in a Petition for Writ of Certiorari before this Court.

Any objection Peabody may have to the Department of Labor's regulation on evaluating treating physicians' opinions has no bearing on the decision on Mrs. Groves's eligibility for benefits. In this case, as noted previously, the regulation played no part in the ALJ's decision to award black lung benefits to Mrs. Groves. Both the ALJ and the Benefits Review Board decided to award benefits to Mrs. Groves *before* the Department of Labor issued 20 C.F.R. § 718.104(d) in its final form. The regulation, which was not applicable to claims until January 19, 2001, did not have an effect on this claim at the administrative level. The decisions of the ALJ and the Board were issued in

1998 and 1999 respectively. Peabody's complaint about the treating physician regulation has no place in this case.

CONCLUSION

The Petition for Writ of Certiorari to the Sixth Circuit Court of Appeals sought by Peabody should be denied. Peabody has failed to raise an issue that should be addressed by this Court. The circuits agree in their assessment of treating doctors' opinions and review those doctors' opinions similarly. The Sixth Circuit did not use a treating physician presumption in violation of the APA. Peabody's complaints about the rule that the Department of Labor promulgated on treating physicians' opinions had no bearing on the decision to award benefits and should not be addressed by this Court. The Petition must be denied.

Respectfully submitted,

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